**IN THE SUPREME COURT OF FLORIDA**

**GEORGE PORTER, JR.,**
**Petitioner,**

**v.** **CASE NO. SC 01-2707**

**MICHAEL W. MOORE, Secretary,**
**Florida Department of Corrections,**
**Respondent.**
**_____/**

**ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT**
**IN AND FOR BREVARD COUNTY, FLORIDA**

# RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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COMES NOW the Respondent, by and through the undersigned Assistant Attorney General, and responds as follows to Porter's petition for writ of habeas corpus. For the reasons set out below, the petition should be denied.

RESPONSE TO INTRODUCTION

The "Introduction" set out on page 1 of the petition is argumentative and is denied. Porter is entitled to no relief.

RESPONSE TO PROCEDURAL HISTORY

The procedural history set out on pages 2-4 of the petition is essentially accurate, but is substantially abbreviated. The Respondent relies on the following facts as found by this Court in affirming the convictions and sentences on direct appeal:

> Porter elected to represent himself, with the assistance of standby counsel, when he went on trial in November 1987 on two counts of first-degree murder and one count each of armed burglary and aggravated assault. The facts adduced at trial are as follows.
>
> In 1985 in Melbourne, Florida, Porter became the live-in lover of the first victim, Evelyn Williams ("Williams"). Their relationship was stormy almost from the beginning, aggravated by hostility between Porter and Williams' children, especially Williams' daughter, Amber. Several violent incidents occurred during the course of Porter's relationship with Williams. In July 1986, Porter damaged Williams' car while she was at work, and later he telephoned and threatened to kill Williams and Amber. Porter left town shortly thereafter and was not seen again in town until early October 1986. Before Porter returned to Melbourne, Williams had entered a relationship with the second victim, Walter Burrows.
>
> When Porter returned to town, he contacted Williams' mother, Lora Mae Meyer. He told her that he wanted to see Williams, and that he had a gift for her. Meyer told Porter that her daughter did not wish to see him anymore,

and that Williams wanted nothing from him. Nevertheless, Porter persisted. During each of the two days immediately preceding the murder, Porter was seen driving past Williams' house.

A few days before the murder, Porter had a conversation with a friend, Nancy Sherwood, who testified that Porter told her, "you'll read it in the paper." She offered no explanation for Porter's remark. Porter went to the home of another friend, Dennis Gardner, and asked to borrow a gun. Gardner declined, but the gun subsequently vanished from Gardner's home.

On October 8, 1986, Porter visited Williams, who then called the police because she was afraid of him. That evening, Porter went to two cocktail lounges. He spent the night with a friend, Lawrence Jury, who said that Porter was quite drunk by 11 p.m.

At 5:30 a.m. the next morning, Amber awoke to the sound of gunshots. She ran down the hallway and saw Porter standing over her mother's body. Amber testified that Porter came toward her, pointed a gun at her head and said, "boom, boom, you're going to die." Burrows then came into the room, struggled with Porter, and forced him outside. Amber telephoned for emergency assistance.

Williams' son, John, who lived next door, testified that he heard gunshot blasts at about 5:30 a.m. He ran outside and saw Burrows lying facedown in the front lawn. Both Williams and Burrows were dead by the time police arrived at the scene.

On December 5, 1987, as the prosecution was nearly finished presenting its case-in-chief, Porter told the judge that he wanted to plead guilty to the murder charges and no contest to the other charges. When the judge sought the factual basis of the pleas from Porter, Porter denied killing Williams, although said he may have killed Burrows. The judge refused to accept the pleas on that basis. Porter consulted with his standby counsel and then said he would plead guilty to all four charges, but that he did not want to provide a factual basis for the pleas. The trial court conducted an extensive inquiry into the voluntariness of the pleas, and the prosecutor presented the factual basis in support of guilt. Porter admitted his guilt and said he changed his pleas "[b]ecause I want to get it over with." The trial court

accepted the guilty pleas to all four counts.

That night, when Porter returned to his jail cell, he attempted to commit suicide by twice hurling himself to the concrete floor from a fourteen-foot catwalk. Porter broke his leg but suffered no other serious injuries. The physicians who examined Porter concluded there was no reason to believe that Porter was mentally incompetent.

On January 4, 1988, Porter filed a motion to withdraw his pleas of guilty. In a hearing on the motion, Porter testified that the night before he pleaded guilty, he learned through an inmate and a guard that two other guards had said that something bad would happen to Porter's eleven-year-old son if Porter continued to stand trial. Porter contended that this motivated his suicide attempt. However, Porter refused to reveal the names of those who informed him of the threat. The trial court denied Porter's motion to withdraw his pleas.

On January 21, 1988, the trial jury returned to hear evidence in the penalty phase, during which Porter was represented by counsel. The jury recommended death on both murder counts. The trial court imposed a death sentence for the murder of Williams, but imposed a sentence of life imprisonment for the murder of Burrows, finding that the aggravating factors in the latter instance were merely "technical." (FN2) The trial court also sentenced Porter to life for armed burglary and five years for aggravated assault.

> FN2. As to both counts of murder, the trial court found aggravating circumstances that: (1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to that person (these two murders and the accompanying aggravated assault), § 921.141(5)(b), *Fla. Stat.* (1985); and (2) the capital felonies were committed while the defendant was engaged in the commission of a burglary, *id.* § 921.141(5)(d).
>
> The trial court found two additional aggravating circumstances as to the murder of Williams: (1) the murder was especially heinous, atrocious, or cruel, *id.* § 921.141(5)(h); and (2) the murder was

> committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, *id.* § 921.141(5)(i).
>
> The trial court found no mitigating circumstances.

*Porter v. State,* 564 So. 2d 1060, 1061-62 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991). On direct appeal, Porter was represented by Assistant Public Defender Michael S. Becker, who was not his attorney at his capital trial. *Id.,* at 1061.

On appeal from the denial of his *Florida Rule of Criminal Procedure* 3.850 motion, this Court summarized the history of his case in the following way:

> On February 27, 1995, Porter filed the instant amended rule 3.850 (FN3) motion, which contained fifteen issues. The trial court conducted a *Huff* (FN4) hearing on May 22, 1995. Subsequent to that hearing, the trial court issued an order on July 12, 1995, summarily denying all claims raised by Porter except for his ineffective assistance of counsel claims regarding counsel's failure to pursue mental health evaluations for the purpose of developing mitigating evidence and counsel's failure to present other matters in mitigation. On these claims the trial court conducted an evidentiary hearing on January 4 and 5, 1996. Subsequent to this hearing, the trial court denied the claims of ineffective assistance of counsel.
>
> > (FN3.) Porter's initial 3.850 motion was filed on June 22, 1992. That motion contained a public records request under chapter 119, *Florida Statutes.* Porter was given sixty days from the date of full disclosure of all public records to amend his motion. On June 28, 1993, Porter filed an amended motion to vacate the convictions and sentences. The trial court denied the motion because it failed to contain a properly sworn oath. After Porter's motion for reconsideration was denied, he sought review of the order with this Court. On

> November 29, 1994, we granted the State's motion to dismiss without prejudice to Porter filing a properly sworn motion within ninety days of that order. This was the motion that was ultimately denied by the trial court.
>
> (FN4.) *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

*Porter v. State*, 788 So. 2d 917, 920 (Fla. 2001).

RESPONSE TO JURISDICTIONAL STATEMENT

Respondent does not assert that this Court lacks jurisdiction to entertain this petition. However, the claims of error set out on pages 4-5 of the petition are argumentative and are denied.

**RESPONSE TO GROUNDS FOR RELIEF**

**I. THE PROPORTIONALITY CLAIM**

On pages 6-20 of the petition, Porter argues that his death sentence is disproportionate. This claim is procedurally barred because it was raised and addressed on direct appeal, and is not subject to being litigated for a second time in a petition for writ of habeas corpus.

On direct appeal, this Court addressed the proportionality of Porter's death sentence as follows:

> Finally, Porter argues that the death penalty is not proportional in this instance. We disagree. Because death is a unique punishment, *e.g.*, *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988), it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. *See, e.g.*, *Hallman v. State*, 560 So. 2d 223 (Fla. 1990) (reversing a jury override despite a finding of four valid aggravating circumstances

> weighed against only nonstatutory mitigating circumstances). The circumstances of this case depict a cold-blooded, premeditated double murder. The imposition of the death penalty is not disproportionate to other cases decided by this Court. *See, e.g., Turner v. State*, 530 So. 2d 45 (Fla. 1987) (on rehearing), *cert. denied*, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).

*Porter v. State*, 564 So. 2d at 1064-65. This Court has already evaluated the proportionality of Porter's death sentence, and he is not entitled to a second round of proportionality review. *Williams v. Wainwright*, 505 So. 2d 890, 892 (Fla. 1987) ("The proportionality issue was fully litigated in petitioner's direct appeal, [citation omitted], and it is axiomatic that a habeas proceeding will not serve as a second appeal."); *Adams v. Wainwright*, 484 So. 2d 1211, 1213 (Fla. 1986) ("We cannot again address the issue of proportionality of the death sentence imposed in this case, and reweigh those aggravating and mitigating factors we considered four years ago on direct appeal ...."); *Palmes v. Wainwright*, 460 So. 2d 362, 364 (Fla. 1984) ("... the original affirmance of the sentence of death implicitly found the sentence appropriate to the crime under proportionality principles."); *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984).

To the extent that further discussion of this procedurally barred claim is necessary, Porter tips his hand as to its true nature when he states that he "was denied a proper proportionality review" based upon the asserted ineffectiveness of his trial counsel. *Petition*, at 20. The collateral proceeding trial court

heard the evidence and issued a detailed order denying relief on Porter's claims of ineffective assistance of counsel with respect to the presentation of mitigation evidence at his capital trial. In affirming the denial of Rule 3.850 relief, this Court stated:

> Giving appropriate deference to the trial court's factual findings, we agree with the trial court's conclusion that Porter has not demonstrated sufficient prejudice to sustain his burden under the prejudice component of *Strickland.* We conclude that the trial judge's decision is in accord with our decisions in *Asay v. State*, 769 So. 2d 974 (Fla. 2000); *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998); *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997); and *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). Further, this case is very similar to our recent decision in *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000).
>
> In the present case, the trial court found that the defendant failed to cooperate with counsel at the penalty phase of the trial, and thereby defendant himself limited the available evidence. There is additional postconviction expert testimony regarding mitigation which the trial court found to be entitled to little weight in light of conflicting expert testimony. The trial judge found the additional nonstatutory mitigation to be lacking in weight because of the specific facts presented. Finally, following a full evidentiary hearing, the trial judge determined that the additional mitigators were outweighed by the weighty aggravators of a prior violent felony and a cold, calculated, and premeditated murder. We agree.
>
> In view of our conclusion that the trial court was correct in respect to the failure by Porter to carry the burden on the prejudice component of *Strickland*, we do not reach the first component in respect to competence of counsel. *See Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989) (performance component need not be considered when it is clear that prejudice component has not been met).
>
> Therefore, we affirm the trial court's order in respect to this claim.

*Porter v. State,* 788 So.2d at 925. The "proportionality" claim is,

in reality, an attempt to raise and litigate another specification of ineffective assistance of trial counsel. Of course, that claim is not available to Porter in this habeas proceeding. All relief should be denied.

## II. THE "FAILURE TO RAISE CLAIMS ON APPEAL" INEFFECTIVENESS CLAIM

On pages 20-36 of the petition, Porter raises five separate claims of ineffectiveness on the part of appellate counsel for "failing" to raise various claims. For the reasons set out below, none of these claims are a basis for relief.

### 1. THE PROSECUTORIAL MISCONDUCT CLAIM

In discussing whether claims were preserved for review in a petition for writ of habeas corpus, this Court has stated:

> We have "repeatedly held that appellate counsel cannot be considered ineffective for failing to raise issues which [were] procedurally barred ... because they were not properly raised at trial." *Williamson,* 651 So. 2d at 86-87; *see, e.g., Groover*, 656 So. 2d at 425; *Medina*, 586 So. 2d at 318. Because this issue was not preserved for review, if it had been raised on appeal, it would have warranted reversal only if it constituted fundamental error, which has been defined as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Urbin v. State*, 714 So. 2d 411, 418 n. 8 (1998) (*quoting Kilgore v. State,* 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n. 5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied,* 523 U.S. 1083, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998).

*Rutherford v. Moore,* 774 So. 2d 637, 646 (Fla. 2000). In a case similar to this one, this Court denied a claim of ineffectiveness

on the part of appellate counsel, stating:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So. 2d at 470; *Hardwick,* 648 So. 2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State,* 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").
>
> First, Freeman argues appellate counsel was ineffective in failing to raise the issue of the prosecutor's improper arguments made during the guilt phase of the trial and for failing to raise as an issue the trial court's error in denying the motion for mistrial based upon the improper comments. Specifically, Freeman argues the prosecutor made statements that the jury should use this case to send a message to the community and

> interjected his own opinion by stating defense counsel had the "gall" and the "nerve" to argue self-defense. Freeman argues the underlying merits of this issue without citing any cases to demonstrate that appellate counsel's failure to raise the arguments fell measurably below the standard of competent counsel. **These issues are a thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition.**

*Freeman v. State,* 761 So. 2d 1055, 1069-70 (Fla. 2000) [emphasis added]. *Happ v. Moore,* 784 So. 2d 1091, 1098 (Fla. 2001) ("An appellate counsel may not be deemed ineffective for failing to raise an unpreserved issue on appeal."); *See also, Johnson v. Singletary,* 695 So. 2d 263 (Fla. 1996); *Thompson v. State,* 759 So.2d 650, 664 (Fla. 2000) ("... appellate counsel cannot be deemed ineffective for failing to raise improper comment on direct appeal that would not have constituted reversible error."); *Teffeteller v. Dugger,* 734 So. 2d 1009, 1027 (Fla. 1999).

When those well-settled standards are applied in this case, there is no basis for relief -- even had the matters complained of been preserved at trial and raised on appeal, they would not have constituted grounds for relief. Moreover, with respect to the individual "errors", a review of the record establishes that the true facts are not nearly as egregious as Porter alleges.[1] With respect to Porter's claim that the prosecutor turned the trial into a "sham", the trial record at R.1493, R.1554 and R.1575 sets out no

[1]Of course, Porter entered a guilty plea, contrary to the implication in the petition, which leaves the impression that some sort of egregious misconduct took place at the guilt phase of his trial.

statements at all by the prosecutor -- the transcript at those points is a colloquy between Porter and the Court. The record reveals no impropriety or overreaching by the State at R.1521 -- while a statement by one of the prosecutors is set out on that page of the record, that portion of the record is also a colloquy between Porter and the Court. The incident of laughter by one of the prosecutors which appears at R.1023 resulted in the jury being instructed not to "pay any attention" to the laughter, and there certainly was no adverse ruling from which to appeal. In any event, Porter subsequently entered a plea of guilty (R.1523), and whatever may have occurred during the guilt phase of Porter's trial ceased to be a viable appellate issue at that point.[2]

With respect to the matters arising from the penalty phase of Porter's trial, Porter was, at that point, represented by counsel -- the implication that there was some overreaching directed toward a *pro se* litigant is misleading. It is true that one of the prosecutors assumed the role of a mannequin during the guilt phase of porter's trial in an attempt to demonstrate to the jury what the trajectory of the various bullets was. (R958). A passing reference was made to this during the State's closing argument at the penalty

[2]Whether the prosecutor "sarcastically responded" to Porter's self-representation at R.570 and R.698 is not a viable issue because of the subsequent guilty plea. Likewise, any "refusal" to allow Porter to handle evidence during the examination of witnesses is not a viable claim. (R.556). Further, the references to R.933-34 and 1272 are based upon matters that were obviated by Porter's guilty plea.

phase of the trial, and there was no objection raised thereto. Because that is so, appellate counsel cannot have been ineffective for not raising an issue that was unpreserved. In any event, Porter has not demonstrated that any error occurred, and, even if some error did take place, it was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Whatever the events referred to at R.2096 and R.2141-45 truly were, the record is clear that trial counsel was well aware of the trial court's concerns that some off-the-record discussion had taken place, and chose to make no objection, stating that he did not believe there was any prejudice to Porter. (R.2144). Any objection was waived, and appellate counsel cannot have been ineffective for not raising a claim that was not only unpreserved but also meritless. There was simply no issue to raise, and there is no basis for relief. The record at R.1842-44 simply does not reflect that the prosecutor "directed witnesses" to look to the State's counsel table for answers to cross-examination questions. This claim is factually unsupported, and, consequently, could not have been raised on direct appeal.

Porter also argues that the state "refused to control [the] family witnesses in the audience" and that they made such a "commotion" in the courtroom that they were "admonished" by the Court. This claim is remarkably misleading, but is easily addressed by reference to the Court's statement:

> There have been things that have happened that prompted the Court to interrupt the argument and address the issue. **I've been watching the jury and they have not seen it.**

(R2224). Despite the hyperbole of Porter's brief, the posture of the record is that the jury did not see whatever "commotion" Porter is referring to, and, because that is so, there was no objection, and hence nothing for appellate counsel to raise on appeal.

2. THE NON-STATUTORY AGGRAVATION CLAIM

The second issue that Porter asserts should have been raised on direct appeal is his claim that the sentencing court relied on "non-statutory aggravation" in imposing a sentence of death. This claim is not properly before the court in a petition for writ of habeas corpus because it is the sort of claim that should be raised (and in this case was so raised) in a motion for Rule 3.850 relief. In denying relief on the **substantive** "non-statutory aggravation" claim, the collateral proceeding trial court found that it was meritless because the "non-statutory aggravation" was, in fact, the facts of the murders and the facts relied upon in finding that the murder was heinous, atrocious, or cruel, an aggravator that was stricken by this Court on direct appeal. (Appendix A, at 20). Specifically, this Court held,

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the

> victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

*Porter v. State,* 564 So.2d at 1063. This claim is based upon a false premise, and it stands reason on its head to suggest that relief can be granted on ineffectiveness grounds when the aggravator at issue was **stricken** on direct review. This claim was not available to Porter on direct appeal because it did not exist, and appellate counsel can hardly be faulted for not including such a frivolous claim.

3. THE MITIGATING CIRCUMSTANCES CLAIM

On pages 26-27 of the petition, Porter alleges that appellate counsel was ineffective for not arguing that the sentencing court committed error in not finding certain matters as mitigation. This claim, like the others, is merely an inappropriate attempt to use the habeas petition as a second direct appeal. Moreover, this claim was raised, and rejected on procedural bar grounds, in the Rule 3.850 proceedings. *Porter v. State*, 788 So. 2d 917, 921 n.6 (Fla. 2001). This claim cannot be relitigated in this proceeding, and all relief should be denied. As this Court has stated:

> Furthermore, this claim was raised in the current rule 3.850 motion. *See Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

*Kokal v. Dugger,* 718 So. 2d 138, 143 (Fla. 1998). Moreover:

> Claims 1 and 2 are not proper claims for habeas corpus relief. "[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). As to the substance of claim 2, this Court rejected this argument in *Hudson v. State*, 708 So. 2d 256 (Fla. 1998), and *Blanco v. State*, 706 So. 2d 7 (Fla. 1997). Claims 3, 4, and 5 were also raised in Atwater's motion for postconviction relief and are procedurally barred as well. *See Parker*, 550 So. 2d 459. As for the claims of ineffective assistance of appellate counsel raised in claims 1 and 3, these claims are without merit. *See Harvey v. Dugger*, 650 So. 2d 982 (Fla. 1995); *Ferguson v. Singletary,* 632 So. 2d 53 (Fla. 1993); *Scott v. Dugger*, 604 So. 2d 465, 469 (Fla. 1992) (*citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

*Atwater v. State,* 788 So. 2d 223, 227 (Fla. 2001)[3]. This sub-claim is not a basis for relief.

4. THE PENALTY PHASE INEFFECTIVENESS CLAIM

On pages 27-29 of the petition, Porter argues that appellate counsel was ineffective for not raising a claim of penalty phase

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[3]The claims, as framed by this Court, were:
(1) The trial court gave a nonstandard *Enmund/Tison* [footnote omitted] jury instruction in the penalty phase and appellate counsel was ineffective in failing to raise this issue; (2) Atwater's sentence rests upon an unconstitutionally automatic aggravating circumstance; (3) Atwater's rights were denied by the judge and jury's consideration of nonstatutory aggravating circumstances. Appellate counsel rendered ineffective assistance by failing to raise this claim; (4) Electrocution is cruel and unusual punishment; (5) No reliable transcript of Atwater's trial exists, and reliable appellate review was and is not possible, and there is no way to ensure that which occurred in the trial court was or can be reviewed on appeal, so the judgment and sentence must be vacated.
*Atwater v. State, supra.*

ineffective assistance of counsel. This claim was, of course, raised in Porter's Rule 3.850 motion (where it was the subject of two days of testimony at the evidentiary hearing), and was litigated on appeal from the denial of Rule 3.850 relief. *See Porter v. State,* 788 So. 2d at 921. Florida law is well-settled that a claim that was properly litigated in a Rule 3.850 motion cannot be re-litigated in a petition for writ of habeas corpus. *Atwater, supra.* Further, Florida law is settled that ineffectiveness claims should be raised in the Court in which the alleged ineffectiveness occurred. *Shere v. State,* 742 So. 2d 215 (Fla. 1999). Moreover, the fact that this claim was the subject of a two-day evidentiary hearing well-demonstrates why it would not have been appropriate for this claim to be raised, in the first instance, on direct appeal. Had counsel attempted to raise the claim, this Court would not have been able to decide it without the evidentiary development that took place, in due course, during the Rule 3.850 motion. Finally, this claim is meritless because appellate counsel cannot have been ineffective for "failing" to raise a claim that has no merit -- this Court affirmed the Rule 3.850 trial court's finding that counsel was not constitutionally ineffective, and, because that is so, appellate counsel cannot have been "ineffective" for not raising a claim that is not a basis for relief. This claim is inappropriately raised in this proceeding and, moreover, is wholly meritless. It is not a basis for relief.

## 5. THE INACCURATE TRANSCRIPT CLAIM

On pages 29-35 of the petition, Porter argues that his appellate counsel was ineffective for "failing to ensure that this Court reviewed an accurate transcript of his capital trial." *Petition,* at 29. Porter acknowledges that this Court rejected this claim on appeal from the denial of Rule 3.850 relief, but asserts that the claim is re-argued "to preserve the issue for federal review."

In dealing with this issue on appeal from the denial of Rule 3.850 relief, this Court held:

> ...we find Porter's claim that the record on direct appeal was incomplete to be procedurally barred because it should have been raised on direct appeal. *See Muhammad v. State*, 603 So. 2d 488 (Fla. 1992). To the extent that this claim is based on newly discovered evidence, we find that the record clearly refutes the claim. In fact, a comparison of the record that Porter has now obtained from postconviction counsel to the record on appeal reveals that the record on appeal was more complete and comprehensive. Therefore, Porter suffered no prejudice as a result, and no evidentiary hearing was required.

*Porter v. State,* 788 So. 2d at 926. Because this claim was properly the subject of the Rule 3.850 proceedings, it is not properly litigated in the context of a petition for writ of habeas corpus. Moreover, in addition to being procedurally barred, as this Court held, the claim is also meritless, as this Court alternatively held. Appellate counsel cannot have been ineffective for not raising a claim that has no merit.

## III. THE *APPRENDI* CLAIM[4]

On pages 36-43 of the petition, Porter argues that he is entitled to relief based upon *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). This claim is not only procedurally barred, but also meritless.

Under settled Florida law, a claim cannot be raised for the first time in a motion for post-conviction relief or in a petition for writ of habeas corpus. The *"Apprendi"* claim was not raised on direct appeal, and, consequently, is procedurally barred under settled law. Moreover, this claim was not raised in Porter's Rule 3.850 motion (where it would likewise have been procedurally barred). The double layer of procedural bar is an adequate and independent state law ground for the denial of relief which should be applied and enforced by this Court.

Alternatively and secondarily, this claim is meritless. In *Mills v. Moore*, this Court addressed the applicability of *Apprendi* to Florida's capital sentencing scheme, and found that it was inapplicable. This Court held:

> In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), (FN2) the Supreme Court announced the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, 120 S.Ct. at 2362-63. The Court specifically stated in the majority opinion that *Apprendi* does not apply to already challenged capital sentencing

[4]This claim is incorrectly numbered "Claim IV" in Porter's petition.

schemes that have been deemed constitutional. The Court stated:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
>
> "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

*Id.*, 120 S.Ct. at 2366 (citations omitted). And one justice, in a separate concurring opinion, indicated that issue was left to be decided in the future. *Id.*, 120 S.Ct. at 2380 (Thomas, J. concurring).

The Court was referring to its earlier decision in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), wherein it addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. *Id.* at 647-48, 110 S.Ct. 3047. (FN3) Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either.

Mills argues that *Apprendi* overruled *Walton* and relies upon the five-to-four split in the Court. Four justices stated in dissent that *Apprendi* effectively overruled *Walton*, and another justice in his concurring opinion stated that reconsideration of *Walton* was left for

another day. With the majority of the justices refusing to disturb the rule of law announced in *Walton,* it is still the law and it is not within this Court's authority to overrule *Walton* in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

No court has extended *Apprendi* to capital sentencing schemes, and the plain language of *Apprendi* indicates that the case is not intended to apply to capital schemes. *See State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997, 1016 (2000) (noting *Apprendi* did not apply to capital sentencing schemes and did not overrule *Walton*); *Weeks v. State*, 761 A.2d 804, 806 (Del. 2000) (*en banc*) ("[W]e are not persuaded that *Apprendi's* reach extends to 'state capital sentencing schemes' in which judges are required to find 'specific aggravating factors before imposing a sentence of death.'"), *cert. denied*, 531 U.S. 1004, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000); *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168, 193-94 (2000) ("The United States Supreme Court's recent opinion in *Apprendi* ... does not affect our prior holdings regarding the inclusion of aggravating circumstances in an indictment.... [A]n indictment need not contain the aggravating circumstances the State will use to seek the death penalty ...."), *cert. denied*, --- U.S. ----, 121 S.Ct. 1379, 149 L.Ed.2d 305 (2001). Importantly, in *Weeks v. Delaware*, a capital defendant brought his second habeas petition on October 27, 2000, alleging an *Apprendi* violation and seeking a stay of his execution which was set for November 17, 2000. The trial court ruled that *Apprendi* did not apply to Weeks' case. Weeks appealed and the trial court's ruling was affirmed. On November 16, 2000, just one day before the scheduled execution, the United States Supreme Court denied certiorari. *Weeks v. Delaware*, 531 U.S. 1004, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000). The Supreme Court's denial of certiorari indicates that the Court meant what it said when it held that *Apprendi* was not intended to affect capital

sentencing schemes.

> (FN2.) *Apprendi* involved a New Jersey statute that authorized an enhanced penalty for a crime proven to be a "hate crime" if the judge found by a preponderance of the evidence that the crime was motivated by a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. The defendant in *Apprendi* was not charged with a "hate crime" in the indictment. He pled guilty on three counts, and the judge enhanced the penalty on one of the counts beyond the statutory maximum, in accord with the "hate crime" enhancement statute, after he held a hearing to determine the "purpose" of the crime.
>
> (FN3.) Florida's sentencing scheme was originally upheld in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), which observed that the jury's recommendation is advisory only and that the sentence is to be determined by the judge, and held that jury sentencing is not constitutionally required.

*Mills v. Moore,* 786 So. 2d 532, 536-37 (Fla. 2001). The *Apprendi* claim is foreclosed by the precedent of this Court in addition to being procedurally barred under long-settled law. This claim is not a basis for relief.

**IV. THE CUMULATIVE ERROR CLAIM**[5]

On pages 43-44 of the petition, Porter argues that the "cumulative effect" of unspecified errors deprived him of a fair trial. The "errors" upon which this claim is based are not

[5]This claim is numbered as "Claim V" in the petition. It has been renumbered for consistency.

identified other than by Porter's statement that they have been "revealed" in the habeas corpus petition, in the Rule 3.850 proceedings, and on direct appeal. Such a cryptic reference is insufficient to present a claim for review by this Court, and, in any event, it is a settled principle that a habeas petition does not serve the purpose of a second appeal. Porter's strategy is squarely contrary to that basic premise. Moreover, no provision of Florida law allows Porter to incorporate the Rule 3.850 claims, which have already been decided adversely to him, into this petition and have this Court review those claims again. That is directly contrary to the purpose of habeas litigation, which is based upon the premise that claims that were (or can be) considered in a Rule 3.850 motion are not cognizable in a habeas petition. Moreover, in addition to the foregoing procedural defects, the cumulative error claim is, itself, procedurally barred because it was not raised at trial or on direct appeal. *Cook v. State,* 792 So.2d 1197, 1201(Fla. 2001).

Moreover, because no error occurred, there is nothing to "cumulate" to support a grant of relief. *Stewart v. State,* 2001 WL 1095326 (Fla. 2001) ("Because we determine that no errors occurred, we necessarily must conclude that this claim is also without merit."); *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999) (same). Likewise, this claim is insufficiently pled. In the context of a cumulative error claim raised in a Rule 3.850 motion (which is the

proper vehicle for raising such a claim), this Court has stated:

> The trial court summarily denied this claim as improperly pled, stating "no particular allegations or citations to the record, nor any indication of the true nature of the claim" had been alleged. A postconviction movant must specifically identify the claims which demonstrate the prevention of a fair trial. Mere conclusory allegations do not warrant relief. *See Valle v. State*, 705 So. 2d 1331 (Fla. 1997); *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Smith v. Dugger*, 565 So. 2d 1293 (Fla. 1990); *Kennedy v. State,* 547 So. 2d 912 (Fla. 1989). Accordingly, this claim was insufficiently pled and properly summarily denied. *See Rivera v. State*, 717 So. 2d 477 (Fla. 1998).

*Freeman v. State,* 761 So. 2d 1055, 1068-69 (Fla. 2000). This claim suffers from the same inadequate pleading, and relief should be denied on that basis, as well. The cumulative error claim is not a basis for relief.

**V. THE COMPETENCY FOR EXECUTION CLAIM**[6]

On pages 44-45 of the petition, Porter argues that he may be incompetent for execution. As Porter recognizes, this claim is not ripe for review because no warrant for the execution of his death sentence has been issued. This claim is untimely, and no relief is available under controlling case law. This Court has specifically held:

> Hall next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute Hall, who may be incompetent at the

[6]This claim has been renumbered as Claim V. It was numbered as "Claim VI" in the petition.

> time of execution. Hall concedes that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. (FN2) We agree and find this claim to be without merit.
>
> (FN2.) *Fla. R.Crim. P.* 3.811(c) provides:
>
> **Stay of Execution**. No motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes.

*Hall v. Moore,* 792 So. 2d 447, 450 (Fla. 2001); *Mann v. Moore,* 2001 WL 776293 (Fla. 2001); *Thompson v. State,* 759 So.2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So.2d 37 (Fla. 1999). This claim is premature, and should be dismissed.

## CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Kevin T. Beck** and **Leslie Anne Scalley**, CCRC - Middle, 3801 Corprex Park Dr., Suite 210, Tampa, FL 33619-1136, on this _____ day of January, 2002.

Of Counsel

**CERTIFICATE OF COMPLIANCE**

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL